Supreme Court, U.S.
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(4)

No. 04-922

**IN THE**

**Supreme Court of the United States**

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NATIONAL WRESTLING COACHES ASSOCIATION,
COMMITTEE TO SAVE BUCKNELL WRESTLING,
MARQUETTE WRESTLING CLUB,
YALE WRESTLING ASSOCIATION, AND
COLLEGE SPORTS COUNCIL,

PETITIONERS,

v.

DEPARTMENT OF EDUCATION,

RESPONDENT

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**On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit**

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# PETITION FOR REHEARING

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## QUESTIONS PRESENTED

Whether the courts below had the subject-matter jurisdiction – *i.e.*, an Article III case or controversy for which the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), waives sovereign immunity – that those courts needed to review the merits of the claim that respondent U.S. Department of Education unlawfully denied a petition to amend or repeal the "Three-Part Test"?

Whether – on the merits – respondent lawfully denied NWCA's petition to amend or repeal and whether a reviewing court can reach the merits in the absence of the administrative record?

## PARTIES TO THE PROCEEDING

Petitioners National Wrestling Coaches Association ("NWCA"), Committee to Save Bucknell Wrestling ("CSBW"), Marquette Wrestling Club ("MWC"), Yale Wrestling Association ("YWA"), and College Sports Council ("CSC") were plaintiffs in the district court and appellants in the court of appeals. Respondent U.S. Department of Education ("USDE") was the defendant in the district court and the appellee in the court of appeals.

Pursuant to this Court's Rule 29.6, petitioners state that NWCA and CSC are non-profit corporations, CSBW, MWC, and YWA are nonprofit associations, and no publicly held company owns an interest of 10% or more in any petitioner.

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## PETITION FOR REHEARING

Pursuant to this Court's Rule 44.2, as set forth in the accompanying certification of counsel and described below, petitioners respectfully ask this Court to rehear their petition to issue a writ of *certiorari* to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

## JURISDICTION

This Court denied a timely filed petition for *certiorari* on June 6, 2005. 125 S.Ct. 2537 (2005). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## AUTHORITIES INVOLVED

The petition appends 5 U.S.C. § 553(e). In pertinent part, 5 U.S.C. § 706 states that a reviewing "court shall review the whole record or those parts of it cited by a party."

## STATEMENT OF THE CASE

This petition for rehearing concerns two aspects of the appellate court's reaching the merits of NWCA's petition-denial claim: (1) did the court have subject-matter jurisdiction to reach the merits (*i.e.*, did NWCA have standing and judicial review under the APA), and (2) did the appellate court properly evaluate the merits (*i.e.*, was USDE entitled to ignore substantive questions about its rule, and can a reviewing court proceed without the administrative record)? On the first question, under the unique circumstances here, this Court's reversing or affirming would enable further proceedings below. On the second question, the appellate court incorrectly deferred to procedurally defective administrative proceedings (*i.e.*, ones that failed to meet the statutory *minima*) and, in any event, should not have decided the merits against NWCA without the administrative record.

**Statutory Background.** In addition to its familiar notice-and-comment requirements, 5 U.S.C. § 553(b)-(c), APA § 4 also requires that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). Although less familiar, "[§ 553(e)] *is of the greatest importance* because it is designed

to afford every properly interested person statutory authority to petition for the issuance, amendment, or repeal of a rule." Administrative Procedure Act: Legislative History, S.Doc. No. 248, 79th Cong., 2d Sess., at 359 (1946) (emphasis added) ("APA Leg. Hist.").

Congress considered 553(e) – like § 553's rulemaking provisions – to confer statutory rights: "[553(e) is] a most useful instrument of... protecting the public," *id.*, derived from the First Amendment: "[t]he right of petition is written into the Constitution itself. This subsection confirms that right where Congress has delegated legislative powers to administrative agencies." *Id.* Against the agency protest to "leav[e] action or inaction to the initiative of the agency concerned," *id.* at 21, the Senate Judiciary Committee noted that "[e]ven Congress, under the Bill of Rights, is required to accord the right of petition to any citizen," and "a petitioner [who] states and supports a valid ground for... relief, manifestly... should be entitled to... relief." *Id.*

Contrary to the *NWCA* panel's leaving the question open, App. 121a, Congress clearly envisioned that "[553(e)] applies not merely to effective rules... *but to proposed or tentative rules.*" *Id.* at 260 (emphasis added); *accord id.* at 201 ("this subsection applies to... proposed or tentative rules"). Where they publish "proposed or tentative rules," moreover, agencies must consider such petitions to modify those rules "because that is one of the purposes of publishing proposed or tentative rules." *Id.* at 201; *accord id.* ("[w]here such petitions are made, the agency must fully and promptly consider them"); *id.* at 359 ("No agency may receive such petitions in a merely pro forma manner. Every agency... will be required to set up procedures for the receipt, consideration, and disposition of these petitions."); *id.* at 260 ("[w]here such petitions are made, the agency must fully and promptly consider them," and "the agency must act on the petition in accordance with procedures set up and published in compliance with section 3(a)"); *see* 5 U.S.C.

§ 552(a)(1)(A), (C) (agencies must publish procedures and methods for making submittals).

The APA defines "agency action" to include "an agency rule, *order*,... or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). "Order" means:

> *the whole or a part of a final disposition*, whether affirmative, negative, injunctive, or declaratory in form, *of an agency in a matter other than rule making*[.]

*Id.* § 551(6) (emphasis added). An agency's petition denial is an order (*i.e.*, the final disposition of a petition).

> The term "agency action" brings together previously defined terms in order to simplify the language for judicial review provisions of Section 10 and *to assure the complete coverage of every form of agency power, proceeding, action, or inaction.*

APA Leg. Hist., at 197-98 (emphasis added); *id.* 255 (same). "[T]he term [agency action] *includes the supporting procedures*, findings, conclusions, or statements of reasons or basis for the action or inaction." *Id.* at 225 (emphasis added).

**District Court Proceedings.** In June 2003, the district court held that petition denials constitute a particularized injury, caused by the agency's denial, and redressable through a court-ordered remand, App. 82a, but that § 553 – and thus § 553(e) – does not apply to interpretive rules, App. 85a; *but see* 5 U.S.C. § 553(b)(A) (only *subsection 553(b)* does not apply to interpretive rules). The district court also held that USDE had limited the scope of the 1995-96 clarification proceeding, to which the court deferred. App. 85a.

In June 2004, petitioners moved the district court to reconsider its dismissal, based on both new evidence and changed circumstances. Rather than docket the motion, however, the court ordered briefing on its authority to entertain the motion absent the appellate mandate. In response, all parties agreed that – regardless of the appellate man-

date – the court had jurisdiction to entertain the motion.

In November 2004, the court docketed (but did not serve) the appellate mandate, without ruling on the Rule 60(b) motion. In petitioning for *certiorari* on January 6, 2005, petitioners understood that the Rule 60(b) motion still was pending, Pet. at iii, 7, which respondent did not dispute.

On March 1, 2005, citing *inter alia* the *res judicata* effect of the *NWCA* litigation, the district court dismissed a related case, which includes an undisputed petition denial. *College Sports Council v. Dep't. of Educ.*, 357 F.Supp.2d 311, 312-13 (D.D.C. 2005) ("*CSC*"). To find no standing for a petition-denial claim in *CSC*, the court cited two decisions that predate the appellate *NWCA* decisions – *Gettman v. DEA*, 290 F.3d 430, 432-33 (D.C. Cir. 2002) and *Hydro Investors, Inc. v. FERC*, 351 F.3d 1192, 1196-97 (D.C. Cir. 2003) – which find no standing for petition denials where the court could not possibly remedy the underlying injury. On a threshold jurisdictional issue, therefore, *CSC* and *NWCA* conflict.

**Court of Appeals Proceedings.** In affirming the district court's merits dismissal of NWCA's petition-denial claim in May 2004, the *NWCA* panel did not discuss standing and declined to address "whether the Three-Part Test is the type of policy subject to the APA's petition requirements." App. 121a. *CSC* is docketed as No. 05-5133 (D.C. Cir.).

## REASONS TO GRANT THE WRIT

1. The decisions below conflict with this Court's supervening *Tenet v. Doe* decision, its recent *Steel Co.* decision, and numerous appellate decisions on the need to resolve threshold jurisdictional issues before reaching the merits.

2. By reaching the merits on the *NWCA* petition claim, but not the *CSC* petition claim, and by withholding reconsideration in the *NWCA* litigation (presumably based on the *NWCA* merits mandate), the courts below have manufactured inconsistent – and unjust – rulings, which this Court can remedy either by striking the appellate court's merits

holding as lacking subject-matter jurisdiction or, instead, by authoritatively holding that the courts below had subject-matter jurisdiction to reach the merits. The former would remove the district court's basis for declining to rule on the *NWCA* Rule 60(b) motion, and the latter would ensure a merits review of the *CSC* petition-denial claim.

3. The decisions below negate the important rights that Congress conferred in § 553(e) and instead empower agencies to circumvent the APA. This Court's review would vindicate the public's rights under § 553(e).

## I. SUBJECT-MATTER JURISDICTION

The *NWCA* panel reached the merits without determining whether the APA waives sovereign immunity for review of petition denials for rules like the Three-Part Test. App. 121a. With its refusing to accept NWCA's naming the federal offices (*e.g.*, Secretary) as invoking the legal fiction of *Ex parte Young*, *see* Fed. R. App. P. 43(c)(1); Pet. 22-24; Reply Br. 8-9 & n.7; Suppl. Br. 8-9, however, the *NWCA* panel erred. *Compare Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-101 (1998) (courts must address threshold jurisdictional issues before merits issue of availability of cause of action) *with Tenet v. Doe*, 125 S.Ct. 1230, 1235 n.4 (2005) (including waiver of sovereign immunity among threshold issues that courts may decide before reaching merits);[1] *cf. Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999) ("a federal court [may] choose among threshold grounds for denying audi-

[1] *See also, e.g., U.S. ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1155-56 (2nd Cir. 1993) (court to consider 12(b)(1) jurisdictional challenges before merits challenges); *Hardemon v. Boston*, 144 F.3d 24, 25-26 (1st Cir. 1998) (declining to "bypass the jurisdictional issue" to reach merits); *U.S. v. Texas Tech Univ.*, 171 F.3d 279, 286-87 (5th Cir. 1999) ("To rule on a merits question before, or in addition to, answering the omnipresent jurisdictional question would contravene the well-established principle that the federal courts may not issue advisory opinions"); *Cunningham v. R.R. Ret. Bd.*, 392 F.3d 567, 570-71 (3rd Cir. 2004) ("must resolve the threshold jurisdictional issue before reaching the merits").

ence to a case on the merits"). Under the *NWCA* holding,because NWCA sued only the United States – *i.e.*, USDE and federal *offices*, not federal *officers* – NWCA needed the APA waiver of sovereign immunity for its action. App. 117a. Without an *APA cause of action*, NWCA lacks an *APA waiver of sovereign immunity*, and (by its own reasoning) the *NWCA* panel lacked jurisdiction to reach the merits. *Cf. Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 126-27 (1804) (setting aside defense judgment at the instance of losing plaintiff who failed to allege the basis for federal jurisdiction).

**A. Standing.** Standing involves a tripartite test of injury, causation, and redressability, and while directly inflicted injuries pose "little question" of causation or redressability, the plaintiff has a heightened showing when government action affects third parties, who then cause injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

The APA confers procedural rights, APA Leg. Hist. at 278 ("procedural rights conferred by this bill"), 359 ("a most useful instrument of... protecting the public"), the denial of which causes a cognizable injury. *Warth v. Seldin*, 422 U.S. 490, 514 (1975). For such procedural injuries, "those adversely affected... generally have standing to complain." *FEC v. Akins*, 524 U.S. 11, 25 (1998).

Although the agency on remand may reach the same result, *id.*, the initial injury remains "fairly traceable" to the procedurally defective initial action and redressable by an order striking the initial agency action, *id.; Defenders of Wildlife*, 504 U.S. at 573 n.7 (procedural-injury plaintiff need not show that, but for the procedural lapse, agency would reach different substantive result). Instead, plaintiffs "accorded a procedural right to protect [their] concrete interests" need show only a sufficiently concrete relationship between the procedural step and the substantive result, and the redressability and immediacy requirements apply to the *present procedural violation*, which may injure the concrete interest, rather than to the concrete (but less certain) future injury. *Id.*

Under the foregoing standards, USDE's refusal to include within its 1995-96 rulemaking a procedure under which NWCA could petition to repeal the Three-Part Test violated NWCA's procedural rights under APA § 4. This is particularly true under statutes (such as Title IX) that Congress patterned after Title VI because Congress expressly considered judicial review of agency rules, regulations, and orders as a procedural protection against agencies' overreaching, to the disadvantage of equal-protection rights. *See* Pet. at 21 & n.14 (citing legislative history).

**B. APA Review.** The APA provides review of agency action made reviewable by statute and final agency action for which there is no adequate remedy. 5 U.S.C. § 704. Denial of a petition to amend or repeal a rule clearly is agency action, as the APA broadly defines that term, *see* Statutory Background, *supra*, and as it has been interpreted. *FTC v. Standard Oil Co.*, 449 U.S. 232, 238 n.7 (1980) (issuance of a complaint is the "final disposition" of whether the agency has reasonable cause to issue the complaint); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51-52 (1955) (APA provides judicial review of agency's final order, even if that review is not the last available remedy). Judicial review is particularly appropriate for challenges to a rule's ongoing rationality, because the petition process is the only way to bring such challenges. *Auer v. Robbins*, 519 U.S. 452, 458 (1997).

*Bennett v. Spear* sets a two-prong test for determining whether agency action is *final:* (1) it "must mark the 'consummation' of the agency's decision making process" and not be "merely tentative or interlocutory" in nature; and (2) it "must be one by which rights or obligations have been determined, or from which legal consequences will flow." 520 U.S. 154, 177-78 (1997) (citations omitted); *cf. Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 n.4 (1986) ("there has been 'final agency action,' in that the Secretary formally has agreed... that there will be no certification"); *cf. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990) (rec-

ognizing APA challenge to "some specific order or regulation, applying some particular measure across the board to all individual [actions]"); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 495 (1991) (allowing judicial review that would entitle appellants to reconsideration under new procedures). Denial of a petition clearly is *final*, assuming *arguendo* that § 704's finality test even applies: every appellate court to reach the issue has found *statutory* review, outside the adequate-remedy bar. *See* Pet. at 22 & n.15; Reply Br. at 7.

## II. MERITS

**A. Refusal to Entertain Petition.** By letter dated October 20, 1995, NWCA petitioned the Hon. Norma V. Cantú, Assistant Secretary for Civil Rights, to change the Three-Part Test both because it exceeded the intent of Title IX and because the circumstances that may have justified its adoption in the 1970s no longer applied. App. 257-58a. (¶¶ 74-75). For purposes of § 553(e), a "petition" includes a letter asking an agency to change a rule, *Am. Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987), or to change a *proposed or tentative rule*, APA Leg. Hist., at 201, 260 (quoted at 2, *supra*). Although the 1996 Clarification acknowledged that parties suggested that the Three-Part Test "provided more protection... than intended by Title IX," USDE simply sidestepped these issues: "it would not be appropriate to revise the 1979 Policy Interpretation." App. 174a (1996 Clarification).

The courts below rely on *Edison Elec. Inst. v. I.C.C.*, 969 F.2d 1221 (D.C. Cir. 1992) ("*EEI*"), for the proposition that "barring extreme arbitrariness, we defer to the agency's decision regarding the management of its own docket." *EEI*, 969 F.2d at 1230 (*citing Nader v. FCC*, 520 F.2d 182, 195-96 (D.C. Cir. 1975)). *Nader*, in turn, relied on this Court's *Schreiber* decision to hold that "regulatory agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *Nader*, 520 F.2d at 195-96 (*quoting FCC v. Schreiber*, 381 U.S. 279, 289 (1965)). *Schreiber* and its

primary authority – *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) – provided the authority for this Court's seminal *Vermont Yankee* decision. *See Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, 435 U.S. 519, 524-25 (1978) (*apart from APA*, "formulation of procedures... basically... left within the discretion of the agencies" and emphasizing this Court's "cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies").

In sum, the courts below rely on a line of precedents as indisputable as it is inapposite. These cases involve *adjudications* where the reviewing courts refused judicially to impose procedural enhancements *in excess* of statutory requirements. Petitioners have no quarrel with this line of cases, but dispute its application here, to a *rulemaking* proceeding conducted without the APA's statutory *minima*. APA Leg. Hist. 201, 260, 359 (requiring agencies to have a process for considering petitions and to respond to any petitions received) (quoted in Statutory Background, *supra*). Simply put, *Vermont Yankee* has no bearing here. *See, e.g., U.S. Lines, Inc. v. Fed'l Maritime Comm'n*, 584 F.2d 519, 540 (D.C. Cir. 1978) ("agency is not free, however, to structure its procedures in violation of applicable statutory requirements"); *U.S. v. Dart*, 848 F.2d 217, 230-31 (D.C. Cir. 1988) ("selective application of the APA is inappropriate, for it undermines protections for the individual citizen that were elsewhere included in that carefully balanced statute").[2]

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[2] Even if it applied to agencies' avoiding APA procedures to evade review, *EEI* still would not apply by its own terms. The *EEI* court faulted EEI for failing to submit its comments to the docket that addressed the agency's statutory authority (*i.e.*, for submitting its comments to the *wrong* docket). *EEI*, 969 F.2d at 1229; 52 Fed. Reg. 32,613 (1987). Here, USDE's *Federal Register* notice expressly solicits "public comment on whether the draft Clarification provides adequate clarity in areas that have generated questions." 60 Fed. Reg. 51,460 (1995). Given that USDE statutorily must identify its authority for every rule, 20 U.S.C. § 1232(b), and that USDE's authority for the Three-Part Test clearly had "generated questions," *e.g.*,

**B. Denial of Petition.** USDE's cursory petition denial and the absence of the administrative record deprives a reviewing court of any basis on which to affirm USDE's action. First, where an agency leaves the court with "no findings and no analysis... to justify the choice made,... [w]e are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice." *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 167 (1962). Second, in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), this Court recognized that APA review requires "the 'whole record' compiled by the agency: the basis for review required by § 706 of the [APA]" and remanded for further proceedings "based on the full administrative record that was before the Secretary at the time he made his decision," *Id.* at 419-20, supplemented by discovery if "additional explanation" was necessary. *Id.* at 420-21; *cf. SEC v Chenery Corp.*, 318 U.S. 80, 94 (1943) ("courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review").

## CONCLUSION

This Court should grant the writ of *certiorari*.

June 30, 2005

Respectfully submitted,

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*Cohen v. Brown Univ.*, 991 F.2d 888, 899-900 (1st Cir. 1993); App. 249-50a (¶¶ 39-40) (congressional inquiries into whether Three-Part Test exceeds legislative intent for Title IX), USDE's statutory authority was a question presented within the 1995-96 rulemaking. Finally, unlike EEI's sending its comments to the wrong docket, NWCA sent its petition directly to the person with the authority to grant it (Assistant Secretary for Civil Rights Cantú), not to Ms. Jeanette J. Lim, the "docket" designated for comments on USDE's clarification. *See* 60 Fed. Reg. at 51,460. Even under *EEI*, therefore, NWCA sent its petition to the right "docket."

## COUNSEL CERTIFICATION

Pursuant to this Court's Rule 44.2, and as specifically set out below, the undersigned counsel for the petitioners in *Nat'l Wrestling Coaches Ass'n v. Dep't. of Educ.*, No. 04-922 (U.S.) ("*NWCA*"), certifies that the grounds proffered in the accompanying Petition for Rehearing are limited to intervening circumstances of a substantial or controlling effect and to other substantial grounds not previously presented.

1. The Petition for Rehearing concerns the petition-denial claim, App. 257-58a (¶¶ 71-77), on which the courts below reached the merits, App. 85a, 121a, without the appellate panel's considering standing or the waiver of sovereign immunity, App. 121a, the exclusive focus of the balance of their opinions.

## OTHER SUBSTANTIAL GROUNDS

2. The Petition for Rehearing sets forth substantial grounds based on the legislative history and purpose of the Administrative Procedure Act's petition process, 5 U.S.C. § 553(e), which were not previously presented. This issue has significance not only to the private parties here but also to the public generally, as it concerns the public right administratively to participate in rulemaking proceedings and agency prerogatives to circumvent that right.

3. To the extent that this Court determines that there is subject-matter jurisdiction for the petition-denial claim, the legislative history of § 553(e) counsels against accepting the *NWCA* panel's deference to the Department of Education's refusal to consider questions to its authority for, and the continuing rationality of, its Three-Part Test. Further, the courts below could not hold that the Department did not consider the relevant letter a "petition" without reviewing the administrative record.

## INTERVENING CIRCUMSTANCES

4. After the petition for *certiorari* was filed in January 2005, this Court decided *Tenet v. Doe*, 125 S.Ct. 1230 (2005),

and the same district court judge dismissed *College Sports Council v. Dep't. of Educ.*, 357 F.Supp.2d 311 (D.D.C. 2005) ("*CSC*") for lack of subject-matter jurisdiction.

**Inconsistent – and Unjust – Rulings**

5. The *CSC* litigation includes the five *NWCA* petitioners, two new plaintiffs, the U.S. Department of Education, and three new federal defendants (the United States and two named officers, served in both their official capacities and their individual capacities under color of legal authority). The *CSC* litigation also includes an unambiguously presented and unambiguously denied petition for the repeal of the "Three-Part Test." Thus, if the *NWCA* panel had subject-matter jurisdiction to reach the *NWCA* petition-denial claim, the *CSC* litigation presents subject-matter jurisdiction.

6. Even if a petition-denial claim does not *per se* provide justiciability (as the district court initially held, App. 82a), petitioners contend that the *CSC* pleadings, as well as the June 2004 *NWCA* motion for reconsideration pursuant to Fed. R. Civ. P. 60(b), cure the pleading defects identified by the *NWCA* panel. Although petitioners understood that their Rule 60(b) motion still was pending in January 2005, *see* Pet. at iii, 7, the district court's *CSC* dismissal signals that the district court essentially "pocket vetoed" that motion by withholding it from the docket until the appellate mandate came down in November 2004.

7. The *CSC* litigation is now docketed as No. 05-5133 (D.C. Cir.), and the federal parties have moved for summary affirmance, D.C. Cir. Rule 27(g), based on the *NWCA* litigation's *res judicata* effect in all respects except the justiciability of petition-denial claims. On petition-denial claims, the federal parties cite two decisions that predate the appellate *NWCA* decisions – *Gettman v. DEA*, 290 F.3d 430, 432-33 (D.C. Cir. 2002) and *Hydro Investors, Inc. v. FERC*, 351 F.3d 1192, 1196-97 (D.C. Cir. 2003) – in which petition-denial claims did not support standing where the court could not

remedy the underlying injury (*i.e.*, the challenged ruling was controlling as a matter of law on the challenged agency and the object of the litigation was valueless, respectively).

8. As a result of the district court's inaction on the *NWCA* Rule 60(b) motion and action in the *CSC* litigation, the petitioners now seek either an authoritative vacating of the *NWCA* merits holding for lack of subject-matter jurisdiction (thereby removing the perceived obstacle to a ruling on their Rule 60(b) motion) or an authoritative ruling that subject–matter jurisdiction exists (thereby ensuring a merits hearing in the *CSC* litigation).

**Reaching Merits without Subject-Matter Jurisdiction**

9. Although petitioners do not know whether the *NWCA* panel was aware of *Gettman* and *Hydro Investors*, but declined to cite them to enable reaching the merits, petitioners do know that Judge Henderson of the 2004 *NWCA* panel also served on the 2002 *Gettman* and 2003 *Hydro Investors* panels. 290 F.3d at 431; 351 F.3d at 1193.

10. Whether or not the *NWCA* panel intended to avoid the issue of standing for petition-denial claims, it expressly declined to address the issue of whether § 553(e) applies to agency actions such as the Three-Part Test. App. 121a. But under its own sovereign-immunity reasoning and under this Court's supervening decision in *Tenet v. Doe*, the *NWCA* panel lacked subject-matter jurisdiction to reach the merits.

11. *Tenet* confirmed that the absence of a waiver of sovereign immunity is among the threshold jurisdictional issues that a court must reach before reaching the merits. 125 S.Ct. at 1235 n.4; *cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-101 (1998) (courts must address threshold jurisdictional issues before merits issue of availability of cause of action).

12. The *NWCA* panel faulted petitioners for naming the federal offices (*e.g.*, Secretary) in their attempt to invoke the legal fiction of *Ex parte Young* and instead confined petition-

ers to the APA waiver of sovereign immunity. *See* Fed. R. App. P. 43(c)(1); Pet. 22-24; Reply Br. 8-9 & n.7; Suppl. Br. 8-9. Under its own sovereign-immunity reasoning, therefore, the *NWCA* panel's failure to identify an *APA cause of action* necessarily also left the *NWCA* panel without an *APA waiver of sovereign immunity*. With no waiver, the *NWCA* panel lacked the subject-matter jurisdiction necessary to reach the merits.

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Respectfully submitted,

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